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In the Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, ET AL., PETITIONERS

v.

PRO FOOTBALL, INC., D/B/A WASHINGTON REDSKINS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether members of a multi-employer bargaining unit may claim the protection of an implied labor exemption from the federal antitrust laws after the collective bargaining contract has expired, the employers and the union have reached an impasse in negotiations over a new contract, and the employers have acted collectively to impose new terms of employment.

TABLE OF CONTENTS

	Page
Interest of the United States and the Federal Trade Commission	1
Statement	2
Summary of argument	6
Argument:	
An employer is not shielded from antitrust scrutiny by an implied labor exemption to the antitrust laws once collective bargaining has reached impasse and the employer has imposed terms of employment	9
Conclusion	27

TABLE OF AUTHORITIES

Cases:

American Ship Bldg. Co. v. *NLRB*, 380 U.S. 300 (1965)	20
Anderson v. *Shpowners Ass'n*, 272 U.S. 359 (1926)	10, 12
Brown v. *Pro Football, Inc.*, 1993 Trade Cas. (CCH) ¶ 70 (D.D.C. 1993)	3
Charles D. Bonanno Linen Service, Inc. v. *NLRB*, 454 U.S. 404 (1982)	17, 24
Connell Construction Co., Inc. v. *Plumbers & Steamfitters Local No. 100*, 421 U.S. 616 (1975)	10, 12, 14
Golden State Transit Corp. v. *City of Los Angeles*, 475 U.S. 608 (1986)	22, 23
Group Life & Health Ins. Co. v. *Royal Drug Co.*, 440 U.S. 205 (1979)	13
H.K. Porter Co. v. *NLRB*, 397 U.S. 99 (1970)	22
Laborers Health & Welfare Trust Fund v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988)	16
Local Union No. 189, Amalgamated Meat Cutters v. *Jewel Tea Co.*, 381 U.S. 676 (1965)	14, 15, 25

Cases—Continued: Page

Lodge 76, Int'l Ass'n of Machinists v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) 21
Mackey v. *NFL*, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977) 11, 13, 18, 22
McCourt v. *California Sports, Inc.*, 600 F.2d 1193 (9th Cir. 1979) 13
McNeil v. *NFL*, 790 F. Supp. 871 (D. Minn. 1992) . 11
Monsanto Co. v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) 17-18
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 17
Morton v. *Mancari*, 417 U.S. 535 (1974) 9
NLRB v. *Brown*, 380 U.S. 278 (1965) 19
NLRB v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) 20
NLRB v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960) 14, 20, 21
NLRB v. *Katz*, 369 U.S. 736 (1962) 16
National Gerimedical Hosp. & Gerontology Ctr. v. *Blue Cross*, 452 U.S. 378 (1981) 9, 10
Northern Pacific Ry. v. *United States*, 356 U.S. 1 (1958) 13
Powell v. *NFL*, 930 F.2d 1293 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991) 2
Radovich v. *National Football League*, 352 U.S. 445 (1957) 10, 11, 13
Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963) 13
United Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 10, 12, 14, 15
United States v. *Borden Co.*, 308 U.S. 188 (1939) 13
United States v. *Container Corp.*, 393 U.S. 333 (1969) 18

Cases—Continued: Page

United States v. *Hutcheson*, 312 U.S. 219 (1941) 12
United States v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) 9
United States v. *Topco Associates*, 405 U.S. 596 (1972) 13

Statutes:

Act of Nov. 8, 1966, Pub. L. No. 89-800, § 6(b)(1), 80 Stat. 1515 (15 U.S.C. 1291) 26
Clayton Act, 15 U.S.C. 12 *et seq.*:
§ 6, 15 U.S.C. 17 ..... 12, 13
§ 20, 29 U.S.C. 52 12
Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* 23
National Labor Relations Act, § 1, 29 U.S.C. 151 21
Norris-LaGuardia Act, 29 U.S.C. 101-115 12
§ 4, 29 U.S.C. 104 12
Occupational Health and Safety Act, 29 U.S.C. 651 *et seq.* 23
Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 75 Stat. 732, 15 U.S.C. 1291 *et seq.* 26
Sherman Act, § 1, 15 U.S.C. 1 ..... 11, 17

Miscellaneous:

H.R. 2740, 104th Cong., 1st Sess. (1995) (Fan Freedom and Community Protection Act of 1995) .. 26
S. 1439, 104th Cong., 1st Sess. (1995) (Fans Rights Act of 1995) 26
Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 Geo. L.J. 19 (1986) 12
Schneider, *Unsportsmanlike Conduct: The Lack of Free Agency in the NFL*, 64 S. Cal. L. Rev. 797 (1991) 22

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INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The United States and the Federal Trade Commission have primary responsibility for enforcement of the antitrust laws. Accordingly, they have a direct interest in the correct formulation of any exemption to the application of those laws grounded in competing policies based on federal labor law. The United States filed a brief as amicus curiae in this case in the court of appeals and at the petition stage in this Court.

STATEMENT

1. This is an antitrust action brought by professional football players who were placed on "developmental squads" of National Football League (NFL) team owners. A collective bargaining agreement between the owners and the players' union, which had no provision for developmental squads or for fixed salaries, expired in 1987, and the owners and players began negotiations towards a new agreement.[1] In 1989, the owners adopted a resolution allowing each team to maintain a developmental squad of six first-year players, whose salaries were to be a fixed amount, agreed upon by all the teams. That resolution was a departure from the customary NFL practice of establishing all players' salaries through individual negotiation. Pet. App. 6a.

In subsequent bargaining with the union, the owners proposed to pay all developmental squad players a fixed salary of $1,000 per week during the 1989 NFL season. After the players' union rejected the concept of fixed salaries, the team owners declared on June 16, 1989, that collective bargaining had come to impasse. The NFL then unilaterally imposed the developmental squad proposal, and the Commissioner of the NFL warned team officials that any team that exceeded the $1,000 salary cap would be subject to disciplinary action. Pet. App. 7a.

Several players (petitioners here) then brought this action to challenge the developmental squad salary agreement. The owners (respondents) con-

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[1] The expired agreement and the prior history of labor relations between the NFL and the players' union are described in *Powell* v. *NFL*, 930 F.2d 1293 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991).

tended that their agreement to impose uniform salaries was protected from antitrust scrutiny by an implied, "nonstatutory" labor exemption from the antitrust laws. The district court struck that defense, ruling that the owners' immunity expired when the prior collective bargaining agreement expired (Pet. App. 75a-79a), or, at the latest, when the parties reached impasse in their negotiations (*id.* at 80a-86a). The district court also ruled that the fixed-salary provisions were not shielded by an implied exemption from the antitrust laws because they were "never encompassed in the expired collective bargaining agreement." *Id.* at 86a. The district court subsequently granted summary judgment for petitioners on liability (*id.* at 93a-115a), and, after a jury trial on damages, awarded them more than $30 million in damages and permanently enjoined respondents from collectively setting regular season salaries for any category of players. *Brown* v. *Pro Football, Inc.*, 1993 Trade Cas. (CCH) ¶ 70,260 (D.D.C. 1993).

2. A divided panel of the court of appeals reversed. Pet. App. 1a-60a. The majority ruled that the fixed-salary agreement is legal because "the nonstatutory labor exemption shields from antitrust challenge alleged restraints on competition imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship." *Id.* at 10a. In so ruling, it rejected petitioners' argument that the nonstatutory labor exemption "applies only where a union has manifested its consent to a restraint on trade by signing a collective bargaining agreement," *id.* at 14a, as well as the argument that the exemption

expires when the parties reach impasse in negotiations on a new collective bargaining agreement, see *id.* at 20a-21a.

The court acknowledged that each of this Court's previous cases involving the implied labor exemption arose in the context of an antitrust challenge to a union-employer agreement that was still in force. Pet. App. 15a. But it did not consider that point dispositive, for it viewed the nonstatutory labor exemption as a "proper accommodation between the congressional policy favoring *collective bargaining* under the [National Labor Relations Act (NLRA)] and the congressional policy favoring free competition in business markets." *Ibid.* (citation omitted; emphasis added by court of appeals). It reasoned that "the juxtaposition of policies giving rise to the exemption focuses on collective bargaining as a *process*, not merely on the *product* of that process—the collective bargaining agreement." *Ibid.* The majority therefore concluded that "the exemption must be broad enough in scope to shield the entire collective bargaining process established by federal law." *Id.* at 16a.

Postulating a "delicate balance of countervailing power that characterizes the [collective bargaining] process," the court stated that "[i]njecting the Sherman Act into the collective bargaining process would disrupt this balance by giving unions a powerful new weapon, one not contemplated by federal labor laws." Pet. App. 20a-21a. Accordingly, the court reasoned, "a proper respect for the national labor policy" requires recognition of the exemption "as a potential shield for all lawful actions taken by either unions or employers pursuant to the collective bargaining process." *Ibid.* The court recognized that

its holding "requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act," and that, in effect, if employees wish to invoke the protections of the antitrust laws, they must "forego unionization or even decertify their unions." *Id.* at 30a. But, the court remarked, "[i]f [employees] choose to avail themselves of the advantages of the collective bargaining process," they have "many benefits" under the federal labor laws (*ibid.*), and, "under the system established by the federal labor laws, employees win concessions not by filing antitrust lawsuits, but with shrewd bargaining, favorable grievance settlements, victories in arbitration, and, when necessary, by striking" (*id.* at 31a).

Judge Wald dissented. Pet. App. 34a-60a. She maintained that the majority's decision "sharply tilts the playing field in employers' favor, and because of that, will erode the vitality of collective bargaining itself." *Id.* at 34a. She further suggested that, because the majority's decision "'effectively gives [employers] * * * the benefit of the antitrust exemption without having to pay for it' through concessions at the bargaining table, * * * [t]he symmetry, mutuality, and give-and-take that lie at the heart of bargaining process are irretrievably lost." *Id.* at 49a.

Starting from the principle that, "[a]bsent special statutory or judge-made exemption, a multi-employer agreement unilaterally imposing uniform industry-wide terms of employment * * * runs afoul of the antitrust laws," Pet. App. 35a, Judge Wald concluded that an implied labor exemption does not shield from antitrust scrutiny such terms when they are unilaterally imposed after the parties have reached

impasse in the collective bargaining process. *Id.* at 59a. She stressed that, while employers may not unilaterally impose terms of employment during collective bargaining, "after impasse, the employer is free [under federal labor law] to unilaterally impose terms reasonably encompassed in bargaining proposals already rejected by the union, because at that point the employer has *exhausted* its statutory duty to bargain." Pet. App. 52a. Therefore, she argued, after impasse, the operation of the antitrust laws does not frustrate the collective bargaining process, and "when an agreement is no longer in sight or even being sought[,] immunity from antitrust liability for terms employers unilaterally impose should terminate." *Id.* at 60a.

SUMMARY OF ARGUMENT

In holding that the implied labor exemption from the antitrust laws shields employers' concerted actions in fixing wages from antitrust scrutiny unless and until employees decertify their union, the court of appeals extended that exemption far beyond its proper scope. Because of the fundamental importance to national economic policy of the Sherman Act, antitrust exemptions must be narrowly construed. In particular, an antitrust exemption to accommodate a separate regime of federal law should be recognized only if the exemption is necessary to make the conflicting statutory scheme work. Even then it should be confined to the minimum extent necessary.

To give effect to federal labor law, it is necessary to shield the terms of collective bargaining agreements from collateral attack by the signatories under the Sherman Act. Collective bargaining could not

operate if labor agreements setting hours and wages, once reached, could be assailed by the parties to the agreements as unreasonable restrains of trade. And because, once a collective bargaining agreement expires, employers have an obligation under federal labor law to maintain the status quo until the parties reach either a new agreement or an impasse in their negotiations, it is also necessary to extend until impasse the antitrust immunity for the terms of the labor agreements maintained by the employer during the bargaining period.

When the parties have reached impasse, however, there is no longer a justification for shielding collective action fixing wages from antitrust scrutiny. After impasse, federal labor law no longer prohibits employers from altering the terms of employment, and individual members of a multi-employer bargaining unit may make interim arrangements with the union on an individual basis. Employers can then comply with both labor law and antitrust law, and should do so. A broader exemption, lasting even after impasse and as long as the employees maintain a collective bargaining relationship with the employer, would sacrifice the protections of antitrust law without the need to accommodate competing requirements of labor law.

In rejecting an impasse standard and holding that employees must decertify their union to pursue remedies under the Sherman Act, the court of appeals has inappropriately required employees to choose between two sets of statutory rights afforded to them by Congress. Nothing in the text or legislative history of the antitrust laws or the National Labor Relations Act (NLRA) suggests that Congress intended to grant a broad antitrust immunity to em-

ployers of unionized employees, or to preclude those employees from pursuing antitrust remedies presumptively available to all. Moreover, the imposition of such a burden on the right of self-organization granted to employees by the NLRA would disserve rather than promote a central policy of the NLRA itself. The court of appeals also gave undue weight to the need to preserve the union-employer balance in the collective bargaining process. The NLRA is not concerned with any particular balance between unions and employers. Indeed, it is withdrawal of the antitrust cause of action that would interfere with the free play of economic forces between employees and employers anticipated by the NLRA. The broad exemption fashioned by the court of appeals also would create a disincentive to serious bargaining, by providing employers with a valuable immunity without requiring them to negotiate for it.

Although there may be cases in which it is not entirely clear whether the parties have reached impasse, that determination is not outside the competence of the courts. In cases like this one, where the employers have unilaterally imposed a change in the terms of employment, no difficulty in determining the point of impasse exists, for such a change amounts to an assertion by the employers that impasse has occurred; otherwise the employers would be committing an unfair labor practice by departing from the status quo while good faith bargaining is still occurring. In other cases, where employers are continuing in force collective restraints embodied in an expired labor agreement, there may be justification for continuing the exemption for such time as is reasonable to allow employers to ascertain, upon advice of counsel, that impasse has in fact occurred

and to adjust their business operations accordingly. Beyond that point, however, an implied antitrust immunity for agreements among employers to fix wages would no longer be grounded in the need to accommodate federal labor law.

ARGUMENT

AN EMPLOYER IS NOT SHIELDED FROM ANTITRUST SCRUTINY BY AN IMPLIED LABOR EXEMPTION TO THE ANTITRUST LAWS ONCE COLLECTIVE BARGAINING HAS REACHED IMPASSE AND THE EMPLOYER HAS IMPOSED TERMS OF EMPLOYMENT

The court of appeals held that so long as employees have a collective bargaining relationship with their employers, they may not invoke antitrust law to challenge their employers' concerted actions to fix wages. See Pet. App. 6a, 28a, 32a-33a. That ruling fails to take account of this Court's admonitions that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351 (1963); accord *National Gerimedical Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981). That "well established" principle (*id.* at 388) reflects the fundamental importance of the antitrust laws as an element of national economic policy. It also reflects the cardinal rule of statutory construction that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

Those principles apply fully to accommodation of the antitrust laws with the labor laws, which are also an expression of fundamental national policy. Any exemption from the antitrust laws to accommodate national labor policy must be firmly grounded in what "labor policy requires," *Connell Construction Co.* v. *Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622 (1975), and should operate only to the extent that there is an actual conflict with a requirement of federal labor law. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 666 (1965); *National Gerimedical*, 452 U.S. at 390.

No such conflict requiring an ouster of the antitrust law exists once the parties have reached impasse in their negotiations over a new collective bargaining agreement. After that point, it is possible to give effect to the requirements of both labor law and antitrust law, and there is no justification for favoring one regime at the expense of the other. When collective bargaining has reached impasse and the employer has imposed terms of employment, therefore, an implied labor exemption from the antitrust laws should not shield the employer. Accordingly, the NFL may not claim the exemption in this case.

1. a. Well before the enactment of the NLRA, it was established that concerted action by a group of employers to control the labor market is subject to the antitrust laws. *Anderson* v. *Shipowners Ass'n*, 272 U.S. 359 (1926); see also *Radovich* v. *National Football League*, 352 U.S. 445 (1957).[2] Indeed, the

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[2] In *Radovich*, the Court summarily rejected as "lacking in merit" (352 U.S. at 454) the National Football League's argument that a prospective player's allegation of a League boycott

court of appeals acknowledged that, in the absence of an exemption, a multi-employer agreement unilaterally imposing uniform industry-wide terms of employment would be subject to the antitrust laws. See Pet. App. 24a (citing *Radovich*); *id.* at 35a (dissenting opinion). But the majority believed that "the inception of a collective bargaining relationship irrevocably alters the governing legal regime," *id.* at 24a, such that when there is "a labor market organized around a collective bargaining relationship, antitrust policy must give way" to labor law, *id.* at 28a.[3]

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constituted a "labor dispute" immunized from antitrust scrutiny by the Clayton Act and the Norris-LaGuardia Act. Brief for Respondents National Football League *et al.* at 59-63 (No. 94, 1956 Term) (Dec. 1956).

[3] The court of appeals suggested that employers' anticompetitive restraints on labor markets (as opposed to product markets) are of little concern to the antitrust laws. Pet. App. 24a. The court also acknowledged, however, that petitioners would have had an antitrust cause of action against respondents if they had abandoned their union. *Id.* at 30a. The Sherman Act indeed makes illegal "every" unreasonable contract, combination and conspiracy in restraint of trade, 15 U.S.C. 1, and does not exclude employers' agreements to fix wages (or other terms and conditions of employment).

This case does involve a separate antitrust issue of whether a collective restraint on wages is per se invalid or is subject to the rule of reason. The joint venture characteristics of sports leagues may justify analysis under the rule of reason of unilateral league restraints on wage competition, even though those restraints would be illegal per se in different industries. See *Mackey* v. *NFL*, 543 F.2d 606, 618-620 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977); *McNeil* v. *NFL*, 790 F. Supp. 871, 896-897 (D. Minn. 1992). The district court found an antitrust violation even under the rule of reason; the court of appeals did not reach that issue, which would be open for its consideration on remand.

Nothing in the text of the NLRA mentions any antitrust exemption at all, let alone an exemption specially for employers. Nor does the legislative history of the NLRA indicate any intent on the part of Congress to create an antitrust immunity for employers. Sections 6 and 20 of the Clayton Act (15 U.S.C. 17, 29 U.S.C. 52) in conjunction with the Norris-LaGuardia Act (29 U.S.C. 101-115) do grant unions a statutory labor exemption to the antitrust laws. That exemption, however, is available only for union conduct taken in the course of a dispute over terms and conditions of employment, and then only "[s]o long as a union acts in its self-interest and does not combine with non-labor groups." *United States* v. *Hutcheson*, 312 U.S. 219, 232 (1941); *Connell*, 421 U.S. at 622.[4] The NFL is not entitled to the benefit of the

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[4] It has been suggested that, because the first sentence of Section 6 of the Clayton Act, 15 U.S.C. 17, states that "[t]he labor of a human being is not a commodity or article of commerce," all employer-imposed restraints on labor markets are exempt from antitrust scrutiny (whether or not the employees are unionized). See Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 Geo. L.J. 19, 26-30 (1986); see also Pet. App. 38a (dissent, summarizing commentary). As Judge Wald observed (*ibid.*), it is "not possible to square this minority view with the development of our antitrust jurisprudence." The rest of Section 6 is plainly aimed at *employees'* organizations such as unions, and the legislative history of the Clayton Act gives no indication that Congress intended to immunize *employers'* unilateral (*i.e.*, not negotiated with a union) combinations in restraint of labor markets. Moreover, a blanket exemption for all restraints of labor markets, including those imposed by employers, could not be reconciled with this Court's decisions in *Anderson* and *Radovich*. See also *Pennington*, 381 U.S. at 662 (noting that neither Section 20 of the Clayton Act nor Section 4 of the Norris-LaGuardia Act "expressly deals

statutory exemption. *Radovich*, 352 U.S. at 454. And while the existence of an express antitrust immunity does not absolutely preclude the possibility of an implied immunity as well, it does counsel care in recognizing and defining such an implied immunity. Cf. *United States* v. *Borden Co.*, 308 U.S. 188, 201 (1939).

This Court has also long recognized the importance of the Sherman Act as a "comprehensive charter of economic liberty." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958); see *United States* v. *Topco Associates*, 405 U.S. 596, 606 (1972). In light of that importance, the Court has stressed that exemptions to the Sherman Act must be narrowly construed, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979), and that an implied exemption to the antitrust laws may be recognized only if that exemption is "necessary to make the [conflicting statutory scheme] work and even then only to the minimum extent necessary." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). "This is the guiding principle to reconciliation of the two statutory schemes." *Ibid.*

b. Acting with caution and precision, the Court has recognized a narrow immunity from the antitrust laws for the terms of an existing collective bargaining agreement that are intimately related to the employees' wages, hours, and working conditions, and

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with arrangements [in labor markets] between unions and employers"). The lower courts have therefore correctly concluded that Section 6 does not put collective action by employers to restrict competition in labor markets outside the reach of the antitrust laws. See *Mackey* v. *NFL*, 543 F.2d at 616-618; *McCourt* v. *California Sports, Inc.*, 600 F.2d 1193, 1197 n.7 (6th Cir. 1979).

that do not extend beyond the bargaining unit that is a party to the agreement. See *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 688-690, 692-693 (1965) (opinion of White, J.); cf. *Pennington*, 381 U.S. at 664-666. Although sometimes referred to as a "nonstatutory" immunity (as opposed to the "statutory" exemption for unilateral union actions), the implied labor exemption to the Sherman Act recognized in *Jewel Tea* is in fact firmly grounded in the requirements of another statutory enactment, the NLRA. As the Court carefully summarized the rationale for the exemption in *Connell Construction Co.*, "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." 421 U.S. at 622.

Essential to the formulation of the exemption in *Jewel Tea* was the need to reconcile two federal statutory regimes that would otherwise have been in direct conflict. The purpose of the NLRA is to provide a means "to the ordering of the parties' industrial relationship through the formation of a contract." *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960). Moreover, the "strong labor policy" embodied in the NLRA favors "the association of employees to eliminate competition over wages and working conditions." *Connell*, 421 U.S. at 622. The implied labor exemption simply reflects the common sense recognition that "the goals of federal labor law never could be achieved" if labor contracts, once reached, were declared invalid under the antitrust laws. *Ibid.*; see *Jewel Tea*, 381 U.S. at 712 (opinion of

Goldberg, J.); *Pennington*, 381 U.S. at 664 (because "wages lie at the very heart of those subjects about which employers and unions must bargain," and because the law contemplates "agreements between the union and employers in a multi-employer bargaining unit," "a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws"). As Judge Wald observed, "the collective bargaining scheme * * * would be mortally undercut if collective bargaining agreements were subject to collateral attack * * * as 'combinations in restraint of trade.'" Pet. App. 43a.

Thus, just as all three judges on the court of appeals agreed that petitioners could proceed against respondents under the antitrust laws if they decertified their union, they also all agreed that, if the creation and pay of the developmental squads at issue in this case were treated in an NFL-union collective bargaining agreement, that agreement would be exempt from attack under the antitrust laws while it was in force. But in this case, the old collective bargaining agreement expired, and the new management proposal for fixed salaries (which had not been included in any previous collective bargaining agreement) was resisted by the union and was then imposed by the team owners only after they declared an impasse in the negotiations. This case is therefore not governed by *Jewel Tea*, in which the employer was attempting to attack, through the antitrust laws, an arrangement to which it had agreed pursuant to the collective bargaining regime established by the labor laws. See 381 U.S. at 688 (opinion of White, J.). Rather, the issue in this case is the duration of any implied immunity for the employers' concerted action

taken after the collective bargaining agreement expired.

2. The court of appeals was correct to reject the district court's conclusion (Pet. App. 72a-80a) that an implied labor exemption protects only wage restraints to which the union currently agrees—a position that would require termination of the exemption immediately upon expiration of a collective bargaining agreement. *Id.* at 19a; see *id.* at 51a-52a (dissenting opinion). That position cannot be reconciled with the obligation of employers under federal labor law to maintain the terms of employment established by an expired collective bargaining agreement until impasse. *NLRB* v. *Katz*, 369 U.S. 736, 742-743 (1962). If the antitrust exemption ended before impasse, employers who feared that continued adherence to particular terms pending negotiation of a new agreement might constitute an antitrust offense would face conflicting legal obligations. They could modify the objectionable terms, but they would thereby risk being charged with an unfair labor practice, for the NLRA forbids unilateral changes in working conditions prior to impasse. See *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988); *Katz*, 369 U.S. at 743 (unilateral imposition of conditions of employment during period of bargaining is a "circumvention of the duty to negotiate"). Or they could adhere to the terms of the expired agreement, but that course would carry the risk of treble damages under the antitrust laws. In those discrete circumstances, there is a conflict between the labor laws and the antitrust laws such that both cannot be given full effect, and the antitrust laws should yield to the more specific, and later enacted, obligations of the NLRA.

See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992).

The situation is significantly different once the parties have reached impasse in their bargaining for a new contract. After that point, employers no longer have a duty under the labor laws to maintain the status quo of the expired contract. As this Court has pointed out, once there is an impasse, members of a multi-employer bargaining unit are free as a matter of labor law to negotiate individual arrangements on an interim basis with the union, since such individual, interim agreements "deter * * * unit fragmentation" and thereby promote collective bargaining. *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404, 415-416 (1982). The same reasoning logically leads to the conclusion that, after impasse, it is not an unfair labor practice for individual employers in a multi-employer bargaining unit to make unilateral, interim changes in their terms of employment, notwithstanding union opposition, if those changes have been offered as good-faith proposals during the bargaining process. After impasse, therefore, labor law no longer requires that employers act collectively to maintain or enforce provisions inconsistent with the antitrust laws. Employers are then able to comply with both the labor laws and the antitrust laws, and should so comply.

That does not mean that, after impasse, members of a multi-employer bargaining unit will be forbidden from continuing in force all the terms of an expired collective bargaining agreement. As a matter of substantive antitrust law, employers who, after impasse, independently decide to impose terms of employment do not violate Section 1 of the Sherman Act, for that Act applies only to agreements. *E.g.*, *Monsanto Co.* v.

Spray-Rite Serv. Corp., 465 U.S. 752, 761, 763 (1984). The expiration of antitrust immunity, therefore, will not lead to a disruption of labor markets or a wholesale revision of terms of employment merely because the parties have reached a (perhaps temporary) standoff in their negotiations. Indeed, since (as we have suggested, p. 17, *supra*) members of a multi-employer bargaining unit may independently impose interim terms of employment that were previously put forth in good faith in the collective bargaining, many employers' terms imposed independently after impasse may well resemble or duplicate those that were part of the expired agreement. But *concerted* action by employers after impasse to impose particular terms on employees (or to notify one another before doing so, cf. *United States* v. *Container Corp.*, 393 U.S. 333 (1969)) should be subject to antitrust scrutiny, whether or not the employees are unionized.[5]

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[5] Some joint action by employers in a multi-employer bargaining unit must, of course, fall within an implied exemption if the collective bargaining regime is to operate. Thus, resumption of good-faith bargaining between the union and the employers in the multi-employer bargaining unit to reach a new agreement would be within the implied exemption, just as the bargaining to negotiate the expired contract was exempt. Also, there may be circumstances in which joint action by employers, even if subject to antitrust scrutiny, would be reviewed under the rule of reason rather than a per se rule of invalidity. See *Mackey* v. *NFL*, 543 F.2d at 618-620. For example, in the case of a sports league, a joint decision by the employers to lock out their employees and to field teams with replacement employees might under some circumstances be permissible, even though a similar action would constitute a per se illegal concerted refusal to deal in other contexts, since it could be impractical for some teams that were the subject of a

3. The court of appeals believed, however, that a much broader antitrust immunity for employers was necessary to give room to the process of collective bargaining contemplated by the NLRA. At the heart of its rationale was a concern that applying the antitrust laws would disrupt "the delicate balance of countervailing power * * * by giving unions a powerful new weapon, one not contemplated by the federal labor laws." Pet. App. 19a-20a. That reasoning is seriously flawed in several respects.

The main objection to the court of appeals' conclusion is that it departs from the principle mandating narrow construction of exemptions to the Sherman Act. As we explain above (pp. 9-10, 13, *supra*), the fundamental importance of the antitrust laws requires that any implied exemption be no broader than necessary to permit operation of a separate statutory scheme that imposes conflicting duties. After impasse, nothing in employers' specific legal obligations established by the NLRA conflicts with the antitrust laws' prohibition against combinations in restraint of trade. Yet, in rejecting an impasse standard and holding that employees must

labor dispute to use replacement employees while other teams used their regular employees or fielded no team at all. Cf. *NLRB* v. *Brown*, 380 U.S. 278 (1965) (when one member of a multi-employer bargaining unit is the subject of a selective strike, other members of the unit may lock out their employees and hire temporary replacement workers, to preserve the integrity of the multi-employer group). Similarly, the rule of reason may in some circumstances shield continued collaboration by members of a multi-employer unit to maintain joint benefit or retirement plans previously established through the bargaining process. In short, expiration of the blanket implied exemption does not preclude specific accommodations of labor law policies in applying the antitrust laws.

decertify their union to pursue remedies under the Sherman Act, the court of appeals has inappropriately required employees to choose between two sets of statutory rights afforded them by Congress. A central policy of the NLRA—its conferral on employees of a right to self-organization—would be burdened rather than promoted by needlessly denying only to unionized employees the antitrust remedies presumptively available to all.[6]

Second, contrary to the court of appeals' belief (Pet. App. 19a-20a), the labor laws are not addressed to preserving any *particular* balance of power between unions and employers. As the Court stated in *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960), the NLRA does not authorize the NLRB "to act at large in equalizing disparities of bargaining power between employer and union." Yet that is essentially what the court of appeals has undertaken to do here; the court's result was predicated on a concern that unionized employees should not have (what it perceived as) the "powerful new weapon" of an antitrust cause of action at their disposal, since that would give them "an advantage in bargaining

[6] Enhancing the right of employees to self-organize was the primary thrust of the NLRA. *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 316 (1965). Congress also gave great emphasis in the NLRA to the role of unionization and collective bargaining in promoting labor peace. See *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 247 (1939). There is no reason to believe that the Congress that wrote a law to facilitate unionization also meant to create by implication in that same law a sweeping pro-employer antitrust exemption that employees can avoid only by abandoning their unions or not forming them in the first place—even when there is no conflict between the requirements of the two legal regimes, as is the case after impasse.

over a salary provision about which union members do not care deeply enough to strike." Pet. App. 20a.

To the contrary, it is withdrawal of the antitrust cause of action from the union that would intrude on the collective bargaining process by "regulat[ing] the choice of economic weapons" available to the parties. *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. at 490. As the district court observed, the implied labor exemption can actually provide a disincentive for the employer to bargain earnestly and to sign a new collective bargaining agreement; if the employer is satisfied with the terms of the expired agreement, "all it need do is maintain the status quo and continue to receive exception from antitrust liability for restraints to which the union no longer agrees." Pet. App. 73a. The court of appeals' ruling would effectively give the employer the benefit of an antitrust exemption without having to pay for it through concessions at the bargaining table.[7]

Third, as Judge Wald pointed out, the majority's stress on the need for the exemption to protect the *process* of collective bargaining is basically miscon-

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[7] Particularly unpersuasive is the court of appeals' apparent preference that unions strike rather than sue under the antitrust laws (Pet. App. 20a). The stated policy of the NLRA is to reduce the number of strikes. 29 U.S.C. 151. It does not follow that, because unionized employees would not strike over a particular term or condition of employment, they should not be able to challenge it as a violation of the Sherman Act or some other law. Unions have numerous economic weapons short of a strike. See, *e.g.*, *NLRB* v. *Insurance Agents Int'l*, 361 U.S. at 480-481; *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 133-134, 148-149 (1976). The NLRA does not require that unionized employees precipitate a workplace crisis to advance their bargaining goals.

ceived. Compare Pet. App. 16a-17a with *id.* at 48a-49a. It is true in a sense that the NLRA focuses on the bargaining process, rather than the result of that process, in that neither the NLRB nor the courts have authority to impose contract terms on the parties. *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970). An antitrust cause of action against the employer for concerted action in fixing wages does not contravene that principle, however. Even if the employees were successful in their antitrust suit, the eventual result would not necessarily be the striking of the offending term from the (eventually negotiated) contract. The parties could still bargain to place a restraint on wages in the labor agreement, and the union could extract some concessions from management in return.[8] The presence—or even the potential presence—of an antitrust cause of action may play a role in the bargaining, but it does not impede the parties' freedom to arrive at terms. It may even serve as an inducement for the parties to reach agreement.

It is also true that the NLRA gives the parties considerable room to choose economic tactics during the collective bargaining process, as well as after impasse, by freeing them from other regulatory constraints. See, *e.g.*, *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986). But it is not accurate to analyze an antitrust cause of action as

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[8] Indeed, even after the Eighth Circuit ruled in *Mackey* that the NFL's "Rozelle Rule," restricting players' ability to sign with different teams after the expiration of their contracts, violated the Sherman Act, the players' union agreed to significant restrictions on free agency in subsequent collective bargaining agreements. See Schneider, *Unsportsmanlike Conduct: The Lack of Free Agency in the NFL*, 64 S. Cal. L. Rev. 797, 814-815 (1991).

"imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts." *Id.* at 614. Employers may act individually to impose (at least interim) terms of employment after impasse, and thus they may engage in "the exercise of economic self-help." *Id.* at 615. It is only concerted action among the employers that creates the potential for liability under the Sherman Act.

Finally, after the point of impasse, when it becomes possible to apply fully both the labor laws and the antitrust laws, the relation between the NLRA and the Sherman Act is basically no different from the relation between the NLRA and other federal statutes affecting the balance of power between labor and management. The Fair Labor Standards Act (29 U.S.C. 201 *et seq.*), for example, prohibits employers from imposing wages below the federal minimum or hours (at regular compensation) above the federal maximum. The Occupational Safety and Health Act (29 U.S.C. 651 *et seq.*) similarly bars management from maintaining working conditions that, in the absence of that statute, they might wish to maintain. Yet the NLRA does not require that employees decertify their unions to pursue their remedies under those statutes; nor does it suggest that unionized employees must be willing to strike over violations of the statutes if they deem the violations important. Whether or not these statutes give unions weapons that courts might think are too powerful in the context of collective bargaining, employers can, and so must, obey them.

4. The district court expressed concern about an impasse standard for the termination of the implied immunity on the grounds that the precise point of impasse may be uncertain, and that different courts

(and the NLRB) might reach different determinations as to whether the parties had reached impasse. Pet. App. 75a, 83a. The district court also noted this Court's observation that impasse is often only a temporary deadlock, eventually resolved through economic force or a change in mind leading to the renewal of negotiations. *Id.* at 82a (citing *Bonanno Linen Service*, 454 U.S. at 412). It is possible, in fact, that impasse could occur more than once within the course of a single labor dispute, which might create uncertainty in determining at any particular point whether an antitrust cause of action existed.

While those concerns are not without some substance, we nonetheless believe that impasse is the logical point of reference for termination of the implied labor exemption, given that employers can then comply with both labor law and antitrust law and the implied exemption is therefore no longer needed to resolve a conflict between the two regimes. There may, however, be justification for the implied exemption to endure after impasse for such time as would be reasonable in the circumstances for employers to take steps to ascertain, upon advice of counsel, that impasse has in fact occurred and to adjust their business operations to eliminate any previously immunized restraint that could give rise to antitrust liability. But in no event should immunity continue when employers have acted jointly to make a unilateral, post-impasse *change* in terms of employment to implement the provision at issue, as occurred in this case. Adoption of such a change is, in effect, an assertion by the employers that impasse has occurred, since the change would constitute an unfair labor practice if made prior to impasse. There is no reason for concern about possible uncertainty in

determing the point of impasse if employers have taken action in reliance on their own conclusion that the parties have reached impasse in their negotiations.

In cases in which employers have acted in concert to continue in force a restraint that was embodied in an expired collective bargaining agreement, the courts will have to examine whether impasse has in fact occurred. Notwithstanding the district court's expressed concerns, that inquiry is well within the competence of the courts and should not unduly delay the progress of the antitrust litigation. Cf. *Jewel Tea*, 381 U.S. at 686 (opinion of White, J.) (in antitrust suits, district court may consider in first instance whether restraint in collective bargaining agreement touched on mandatory bargaining subjects); *id.* at 710 n.18 (opinion of Goldberg, J.) (agreeing with Justice White's opinion on that point). Nor, in such cases, is there likely to be a danger of conflict between the courts and the NLRB, since the employer's continuation of the status quo is not an unfair labor practice.

5. We recognize that it is a much debated issue of policy whether employers, and especially the owners of professional sports league teams, should have immunity from the antitrust laws that lasts as long as the collective bargaining relationship, including periods of impasse. Congress has not extended the antitrust immunities based in the labor laws so far as the employers would wish, however, and it is for Congress to resolve the relevant policy issues. As a practical as well as constitutional matter, Congress, not the courts, has the expertise to decide the economic and political questions inherent in respondents' claim to immunity. Congress has been attentive to concerns that the unique characteristics of professional

sports leagues require modification of otherwise strict requirements of the antitrust laws.[9] There is little reason to believe, therefore, that the policy arguments made in this case about the need to temper antitrust enforcement in the professional sports context will go unheeded in Congress, whether or not those arguments eventually succeed in that forum.

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[9] In 1961, Congress gave the NFL, as well as professional baseball, basketball, and hockey leagues, a limited antitrust exemption for pooled broadcasting rights agreements. See Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 75 Stat. 732, codified at 15 U.S.C. 1291 *et seq.* In 1966, when the NFL sought to merge with the American Football League, it sought and obtained from Congress another antitrust immunity allowing the combining of the two leagues into a single professional football league. Pub. L. No. 89-800, 80 Stat. 1508, codified at 15 U.S.C. 1291 (second sentence). Legislative efforts are currently underway to give the NFL yet another antitrust immunity that would eliminate its antitrust liability if, under certain circumstances, it were to prevent member teams from relocating. See Fans Rights Act of 1995, S. 1439, 104th Cong., 1st Sess.; Fan Freedom and Community Protection Act of 1995, H.R. 2740, 104th Cong., 1st Sess.

CONCLUSION

The judgment of the court of appeals should be reversed,[10] and the case should be remanded for futher proceedings.

Respectfully submitted.

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[10] The National Labor Relations Board concurs that the court of appeals' expansive formulation of the labor exemption is wrong as a matter of law, and may do serious harm to the nation's antitrust and labor policies if not reversed.